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Supreme Court, U.S.
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No. 00-73

IN THE

Supreme Court of the United States

October Term, 1999

JOSEPH M. ANDERSON,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

BRIEF ON BEHALF OF *AMICUS CURIAE* TUSCARORA NATION OF INDIANS SUPPORTING NIAGARA MOHAWK POWER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Upon the written consent of both parties, the Tuscarora Nation of Indians ("Tuscarora Nation") submits this Brief amicus curiae[1] in opposition to the Petition for Writ of Certiorari filed by Petitioner Joseph M. Anderson and in support of Respondent Niagara Mohawk Power Corp. ("NMPC").

1. The Interest of the Amicus Curiae.

The genesis of this lawsuit was the decision by the Tuscarora Nation to require the prior written consent of the Nation as a condition to the provision of electric service to its territory. The consent requirement enables the Nation, as a practical matter, to enforce Nation regulations pertaining to land use and economic development within its territory. Petitioner filed suit in New York Supreme Court, seeking damages against Respondent for breach of a contract to provide electric service without the Nation's consent to businesses operated illegally by Petitioner on Tuscarora territory. The Appellate Division, Fourth Judicial Department, ("Appellate Division"), dismissed Petitioner's action pursuant to New York CPLR 1001 and 1003 for failure to join the Nation as a party .[2] The New

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[1] No counsel for a party authored any part of this brief, and no person or entity other than the amicus curiae made any monetary contribution to the preparation or submission of this brief.

[2] The Tuscarora Nation enjoys sovereign immunity from suit and cannot be joined as a party without its consent. Petitioner does not challenge that fact. Consent has not and will not be given.

York Court of Appeals declined to review the case and this Petition followed.

There is no issue raised in this case which does not implicate the Nation's sovereign authority to regulate the provision of electric service to its territory. Although Petitioner styles the action as a purely private dispute between the individual parties, there is no question that his real target is the consent requirement and, ultimately, the tribal authority which imposed it. Entertainment of actions such as this one in the New York courts threaten both the political and territorial integrity of the Nation.

2. Summary of Argument

The Order of the Appellate Division is consistent with applicable state, federal and Constitutional law. There is therefore no reason at all, let alone a "compelling" one, for granting the Petition. Petitioner's argument that the Nation could not be "inequitably affected" by a money judgment against the Respondent is plainly without merit. The Nation has a critical interest in the subject matter of this action. Regardless of the type of remedy sought, Petitioner can prevail only by establishing that NMPC was contractually obligated to supply him with electric service in violation of the Nation's consent requirement.

The dismissal of this action for failure to join the Tuscarora Nation as a party does not conflict with the jurisdictional grant contained in 25 U.S.C. 233. Section 233 affects neither the Nation's interest in regulating the provision of electric service to its territory nor its status as an indispensable party in actions in which that interest is directly implicated. Because the dismissal does not conflict with the jurisdictional grant, it violates neither the Supremacy Clause nor the Fifth or Fourteenth

Amendments. The dismissal also does not conflict with federal and New York caselaw addressing the question of Indian nations as indispensable parties. In fact, the only "conflict" apparent in this case is that between the willingness of the Appellate Division to acknowledge the Tuscarora Nation's sovereign power to regulate the provision of electric service to its territory and Petitioner's willful refusal to do the same. The fact that Petitioner cannot bring himself acknowledge Tuscarora sovereignty over its internal affairs, despite the consistent reaffirmation of that sovereignty in both federal and State courts, does not entitle him to a hearing in yet another forum.

ARGUMENT

I. Factual Background and Related Legal Proceedings

Several Haudenosaunee Nations, including the Tuscarora, require the Nation's written consent prior to the provision of electric service to Nation territory. [R. 39]. The consent requirement enables the Nations, as a practical matter, to enforce regulations pertaining to land use and economic development within their territories.[3]

Faced with the choice of providing either "non-discriminatory" service in violation of the Nations' consent requirement or providing "discriminatory" service in violation of the regulations of the New York State Public

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[3]The Nations' consent requirement is consistent with 25 C.F.R. 169.22(b), which provides that no agreement between an occupant of tribal lands and a utility provider shall be valid "unless its execution shall have been duly authorized in advance of construction by the governing body of the Indian tribe whose land is affected."

Service Commission ("PSC"), regulations referenced in NMPC's sixty-year-old Franchise Agreements with the Nations, NMPC chose to suspend all new electric service hook-ups. NMPC then brought a declaratory judgment action in the U.S. District Court for the Western District of New York against the Tonawanda Nation and certain individual tribal members seeking a determination of its rights and obligations in light of the apparent conflict between that Nation's consent requirement on the one hand and its obligation to provide non-discriminatory service to its customers on the other. Individual tribal members counterclaimed or sought to intervene in the federal action, seeking injunctive relief and/or damages for NMPC's refusal to provide them with service in the absence of the Nation's consent. The entire action was dismissed and the motion to intervene was denied on the grounds, inter alia, that the Tonawanda Nation was an indispensable party to all claims asserted and could not be joined due to sovereign immunity. Niagara Mohawk v. Tonawanda Band, et al., 862 F.Supp. 995 (W.D.N.Y. 1994).

NMPC next sought help from the State of New York, requesting a declaratory ruling from the PSC on the applicability of PSC regulations to the provision of electric service to Indian Nation territory. [R. 169-181]. In a decision issued April 19, 1995, the PSC substantially adopted the Nations' position, ruling that federal, not State, law was controlling with respect to Indian affairs, that there had been no federal delegation of regulatory authority to the PSC, and that PSC regulations would be applicable to the provision of electric service on Tonawanda and Tuscarora territory if, and only if, the Franchise Agreements in which the regulations were referenced were retroactively approved by the federal government. [R. 61-65; Petition A16 - A21].

NMPC then took the next logical step of requesting the U.S. Department of the Interior, Bureau of Indian Affairs ("BIA"), to retroactively approve the Franchise Agreements. In a letter decision dated January 29, 1996, the BIA declared the Franchises void ab initio, stating that the Franchise Agreements violated 25 U.S.C. 177 (Non-Intercourse Act) as well as the federal regulations which govern the granting of rights-of-way for electric service lines on Indian lands. [R. 55-67]. By Order dated July 23, 1998, the Interior Board of Indian Appeals affirmed.

The PSC Decision, coupled with the determination of the federal government that the Franchise Agreements are void, established that the PSC had no regulatory authority over NMPC's provision of electric service to Indian territories and paved the way for negotiations between NMPC and the Indian Nations for agreements for the provision for electric service to Indian territories in a manner consistent with both Indian sovereignty and federal law, negotiations which are threatened by NMPC's continued exposure to lawsuits like this one.

Subsequent attempts to hold utility service providers liable in New York courts for failure to supply service in violation of the Tuscarora Nation's consent requirement have been dismissed for failure to join the Nation as a party. Those cases include Niagara Mohawk v. Anderson, 258 A.D.2d 958, 685 N.Y.S.2d 502 (4 Dept. 1999) (counterclaim for failure to provide electrical service based on franchise agreement) and Anderson v. Town of Lewiston, 244 A.D.2d 965 (4 Dept. 1997)(action for failure to supply water based on separate agreement). The New York courts have consistently recognized that any determination of such actions would significantly undermine the Nation's sovereignty.

II. Reasons for Denying the Writ.

a. The Appellate Division did not Abuse its Discretion in Dismissing this Action for Failure to Join an Indispensable Party.

1. The Tuscarora Nation is a necessary party.

CPLR 1001[a] provides that persons "who ought to be joined if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (emphasis supplied). Petitioner cannot prevail in this action unless the court makes a finding that either the 1937 Franchise Agreement (the basis of Appellant's second cause of action) or the "Electric Service Agreement" (the basis of Appellant's first cause of action), obligates NMPC to enter onto the Nation's territory and supply Appellant with electricity in violation of the Nation's consent requirement, effectively nullifying the consent requirement.

Any award of money damages would inequitably affect the Nation in that it would promote tribal factionalism by providing an incentive to any other tribal member who finds himself at odds with his nation to enter into similar agreements designed to circumvent tribal regulation and undermine tribal sovereignty, secure in the knowledge that even though actual performance of such agreements cannot be enforced against the will of the Nation, he can nonetheless expect a windfall in the courts. Even if Petitioner did not ultimately prevail, the fact that the Nation's consent requirement had been subjected to the scrutiny of the State courts would erode the Nation's sovereignty and set the stage for further attempts by

Petitioner or any other individual to attack Tuscarora law in State courts. In addition, any willingness on the part of the New York courts to entertain actions that seek to impose liability on third parties such as NMPC for complying with the directives of Indian nations will inevitably hamper those nations in their on-going efforts to enter into legitimate agreements with NMPC and other providers of essential services, to the detriment of all residents of Indian territories. The Nation is therefore a necessary party.

In NMPC v. Tonawanda Band, et al., supra, the District Court was faced with the precise issue presented by Petitioner's second cause of action: whether an Indian nation is an indispensable party in an action by reservation residents against NMPC for breach of its Franchise Agreement with the Nation.[4] In that case, the court held:

> The interest of the Tonawanda Band which is at the center of this dispute is its claimed right under the agreement to prior approval of Niagara Mohawk's provision of electrical power to reservation residents, and a determination on the merits of the counterclaim by the non-moving Defendants against Niagara Mohawk could impair or impede the tribe's ability to exercise that right. That is, a determination in favor of the non-moving Defendants would, in essence if not in substance, result in a holding that Niagara Mohawk has wrongfully refused to provide those applicants with electrical power and that prior approval by the

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[4]NMPC's Franchise Agreement with the Tuscarora Nation is in all material respects identical to its Franchise Agreement with the Tonawanda Nation.

> Tonawanda Band is not required. Thus, the very issue precipitating this action--i.e., whether the franchise agreement requires the tribe's approval prior to Niagara Mohawk's provision of electrical services to a user on the Reservation--could be decided adversely to the tribe without its ever having had the opportunity to protect its interest as a party to the agreement.

862 F.Supp. at 1003-1004. The court went on to dismiss the action in its entirety for failure to join an indispensable party, emphasizing the "paramount importance" of sovereign immunity, and the potential prejudice to the Tonawanda Nation were the action to proceed in its absence. id. at 1004. Likewise, in Niagara Mohawk Power Corp. v. Anderson, supra, the Appellate Division dismissed a Franchise Agreement-based counterclaim for failure to join the Tuscarora Nation as a party on the grounds that "[b]ecause . . . a judgment in [defendant's and intervenors'] favor would challenge the power of the Indian nation, the Indian Nation might be 'inequitably affected' by this litigation." 685 N.Y.S.2d at 503 (quoting Anderson v. Lewiston, supra, 244 A.D.2d at 966.

Petitioner's first cause of action is not premised on the Franchise Agreement but on an agreement between the Petitioner and NMPC [R. 45-46]. The Tuscarora Nation's interest in regulating the provision of electric services on its territory, however, remain the same. From the Nation's perspective, it is immaterial whether the claim is premised on the Franchise Agreement or on a separate agreement. Any determination by the court that NMPC had a valid and binding obligation to enter onto Tuscarora territory and supply the plaintiff with electrical power without the Nation's consent undermines the sovereign power of the Tuscarora Nation to regulate access to and the provision of

electric service on its territory. If anything, the fact that the first cause of action is premised on an agreement which, if enforceable, would have the affect of bypassing the Nation entirely, represents an even greater threat to the Nation's sovereignty than the second cause of action, which at least is premised on an alleged agreement by the Nation to permit the defendant access to its territory.

2. The Appellate Division did not abuse its discretion in dismissing the action.

As set forth, supra, the Nation has a critical interest in the subject matter of this action and is therefore "a person who should be joined under subdivision (a) [of CPLR 1001]," CPLR 1001(b), but cannot be joined due to sovereign immunity. It is plain that under these circumstances the Appellate Division did not abuse its discretion in determining that the action should not proceed in the Nation's absence.

The rationale for dismissal of actions and proceedings to which an Indian nation is a necessary party but cannot be joined due to sovereign immunity has been explored thoroughly in federal caselaw. Because the considerations relevant to determinations pursuant to FRCP Rule 19 are essentially identical to those relevant to determinations under CPLR 1001(b)/1003, see, e.g., Joanne S. v. Carey, 115 A.D.2d 4 (1 Dept. 1986), the analysis of the interplay between the doctrine of tribal sovereign immunity and the doctrine of the indispensable party in the federal caselaw is persuasive authority for the disposition of this case as well.

Not all of the factors listed in FRCP 19 (b) and CPLR 1001 (b) are given equal weight in deciding whether to dismiss an action for non-joinder. This Court has

explained that "the decision whether to dismiss . . . must be based on factors varying with different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." Provident Tradesmens Bank v. Patterson, 390 U.S. 102 (1968). One factor that is of "paramount importance" in indispensable party analysis is the doctrine of sovereign immunity. Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, 548 (2 Cir. 1991) When a necessary party is immune from suit there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests 'compelling by themselves.'" Id. See also, Shermoen v. U.S., 982 F.2d 1312, 1317 (9th Cir. 1992) ("In this case, the absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have [its] legal duties judicially determined without consent."). Wichita and Affiliated Tribes, 788 F.2d 765, 777 n. 13 (D.C.Cir. 1986); Enterprise Management Consultants, Inc. v. U.S. ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989).

In affirming the dismissal of a declaratory judgment action brought by lessees of Indian land on the grounds that the Seneca Nation was an indispensable party, the Second Circuit in Fluent, supra, held that dismissal of an action for non-joinder of an interested party is virtually compelled where non-joinder is due to sovereign immunity: "[t]he rationale behind the emphasis placed on immunity in the weighing of rule 19 (b) factors is that the case is not one where some procedural defect such as venue precludes litigation of the case. Rather the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." 928 F.2d at 548 (citations omitted). For that reason, the

sovereign immunity of a necessary party can warrant dismissal even when no other forum is available for resolution of the claims at issue. Niagara Mohawk Power v. Tonawanda Band, 862 F.Supp. 995, 1002 (W.D.N.Y. 1994)(citing Fluent, 928 F.2d at 547). See, also, Wichita and Affiliated Tribes, supra, 788 F.2d at 777 (dismissing an action for non-joinder where there is no alternative forum is less troubling in cases where dismissal is mandated by tribal immunity than where litigation is precluded by some procedural defect). The assertion at Petition, p. 14, that there is no tribal court at the Tuscarora Nation and that the New York State Supreme Court is therefore the only forum available for resolution of the dispute between Petitioner and Respondent, is therefore not determinative of the dismissal issue.[5]

The Tuscarora Nation's interest in this action includes not having its sovereign right to regulate access and provision of electrical services to its territory adjudicated--or usurped--by the State courts without its consent. Under the caselaw pertaining specifically to the issue of Indian nations as necessary/ indispensable parties, the Appellate Division's determination that the action could not proceed under those circumstances was within its discretion. The Petition for Writ of Certiorari should

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[5]Nor is that assertion accurate. The Tuscarora Chiefs in Council has the power to resolve disputes concerning the provision of electric service to its territory: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978)(citations omitted, emphasis supplied).

therefore be denied.

b. The Reasons Advanced by the Petitioner for Granting the Writ are Without Merit.

1. The dismissal does not conflict with Congress' express grant of jurisdiction pursuant to 25 U.S.C. section 233.

25 U.S.C. Section 233 provides in pertinent part:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State.

By its own terms, Section 233 merely grants the New York courts jurisdiction over civil actions in which some or all of the parties happen to be Indians to the same extent as those courts would have jurisdiction had all parties been non-Indian. It neither abrogates the New York Indian nations' treaty rights to self-government and exclusive jurisdiction over their internal affairs nor grants jurisdiction over such matters to the New York courts. Bowen v. Doyle, 880 F.Supp. 99, 115-123 (W.D.N.Y. 1995)(citing authorities). It guarantees the Petitioner precisely the same access to the New York courts in civil disputes arising under New York law as is enjoyed by non-Indians, and no litigant, Indian or non-Indian, has the right to insist that a New York court proceed to judgment in any action where

an Indian nation is a necessary party but cannot be joined do to sovereign immunity.

Petitioner complains that Section 233 "would be hollow if . . . defendants could evade the law simply by demanding that state courts require joinder of a tribe as a necessary party, no matter how remote a tribe's assertion of an interest in the outcome," [Petition, p. 12]; that the Appellate Division has violated the Section 233 jurisdictional grant by "invoking a procedural rule to mandate dismissal whenever an adverse party suggests a tribal interest might be affected," [Petition, p. 15]; and that "[b]y blindly invoking the necessary party doctrine, the Appellate Division has thwarted Congress' grant of jurisdiction under 25 U.S.C. section 233," [Petition, p. 19]. Those complaints both confuse the general grant of jurisdiction over cases involving individual Indians with the separate issue of Indian nations as indispensable parties and begs the question of whether the Tuscarora Nation's interest in regulating the provision of electric service to its territory makes it a necessary party in this case.

The Tuscarora Nation has a vital interest in its sovereign power to regulate access and the provision of electric or other services on its territory and would be inequitably affected by the adjudication in its absence of any claim in which that power is challenged. The Nation is therefore a necessary party. Because the Nation cannot be joined as a party due to sovereign immunity, the Appellate Division did not abuse its discretion in dismissing this action for failure to join an indispensable party. Appellant's misreading of the jurisdictional grant contained in 25 U.S.C. 233 cannot alter that fact.

2. The type of remedy sought by Petitioner not alter the Tuscarora Nation's status as a necessary party.

Petitioner does not deny that the Tuscarora Nation has an interest in regulating access and the provision of electric services to its territory. He argues only that that interest cannot be inequitably affected by this action because he seeks only money damages and not specific performance of the "Electric Service Proposal". [Petition, p. 13]. The type of remedy sought does not alter the fact that the Nation is a necessary party. A necessary party is anyone "who ought to be joined if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action. CPLR 1001(a). It is true that had Petitioner sought specific performance of the agreement as well as money damages, the Nation would fit the first definition of a "necessary party" as well as the second, but the type of relief sought has no affect on the Nation's status under the second definition, that is, its status as one "who might be inequitably affected by a judgment."

Like the Petitioner, the counterclaiming defendants in Niagara Mohawk v. Tonawanda Band, supra, sought to recover compensatory damages from NMPC for failure to provide electrical services. The court's problem was that it could award neither damages nor injunctive relief without first declaring the legal obligations of NMPC to supply the counterclaiming defendants with electricity. The nature of the relief the counterclaiming defendants sought in the event they prevailed was irrelevant to the Court's holding that the Tonawanda Band was an indispensable party to the counterclaims. What was relevant was the nature of the findings of fact and conclusions of law the court would be

constrained to make if they were to prevail at all. The point emphasized by the Tonawanda court was that any determination in favor of the non-moving defendants "would, in essence if not in substance, result in a holding that Niagara Mohawk has wrongfully refused to provide those applicants with electrical power and that prior approval by the Tonawanda Band is not required." Precisely the same can be said in this case.

In Anderson v. Town of Lewiston, supra, the Appellate Division upheld the lower court's dismissal of an action in which the plaintiff sought an injunction to prevent the defendant from complying with the Tuscarora consent requirement. The dismissal was upheld not only on the grounds that complete relief could not be accorded the plaintiff without the Indian Nation as a party but on the separate and independent grounds that "because a judgment in plaintiff's favor would challenge the power of the Indian Nation, the Indian nation might be 'inequitably affected' by this litigation." 244 A.D. at 966.

Petitioner's related argument that evidence that the Nation would be inequitably affected by a money judgment in this case is not in the Record, [Petition, p. 13], must also be rejected. First, the Nation's interest in the validity and enforceability of the consent requirement permeates the record in this case. The consent requirement itself is set forth in a letter from Chief Leo R. Henry to NMPC at R. 39. Second, Petitioner's claim that there is no indication in the record that the Nation did not consent to the contract for provision of electric service at issue in this case, [Petition, p. 13], is disingenuous at best. Petitioner has never disputed NMPC's assertion, [R. 235], that the Nation's consent to the electric service contract at issue had not been obtained. Petitioner himself has never claimed that the consent requirement was satisfied. Rather, his claims

against NMPC are predicated on the far more insidious proposition that the consent requirement can simply be ignored. See, e.g., R. 261 ("Niagara Mohawk's attempts to read some unwritten 'contingency' into the contract should be rejected").

Finally, any perceived void in the record concerning the interest of the Tuscarora Nation in this case has been more than adequately compensated for by the Nation's amicus curiae submissions at every stage of these proceedings. Given that the Appellant has persistently chosen to ignore the Nation's consent requirement, the fact that he also chooses to ignore the Nation's amicus submissions is hardly surprising, but he cannot reasonably expect this Court to do the same.

3. The Order of the Appellate Division does not violate the Supremacy Clause.

Petitioner argues that the dismissal of this action for failure to join an indispensable party violates the Supremacy Clause of the U.S. Constitution, characterizing it as an attempt by the Appellate Division "to dissociate [it]self from federal law or refuse to exercise jurisdiction bestowed by Congress because of disagreement with the federal law or refusal to recognize the superior authority of its source." [Petition, p. 15].[6] The cases cited by Petitioner do not support that argument. First, the cases cited concern refusals by state courts to entertain causes of action arising under substantive federal law. The only federal law even

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[6]Petitioner raised this argument for the first time in his Application for Leave to Appeal to the Court of Appeals. Since leave to appeal was denied, no New York court has ruled on the issue.

remotely implicated in this case is 25 U.S.C. 233. Section 233 does not create federal causes of action. It merely confirms that the New York courts are not deprived of their jurisdiction over causes of action arising under New York law merely because one or more of the litigants happens to be an Indian. Second, the cases cited by Petitioner stand explicitly for the proposition that "[a] state court may not deny a federal right when the parties and controversy are properly before it." Howlett by and through Howlett v. Rose, 496 U.S. 356, 369 (1990). "[F]ederal law takes the state courts as it finds them" and the Supremacy Clause is not violated when a state court refuses jurisdiction because of a neutral procedural rule. id. at 372. Even if there were federal claims involved in this action, then, the Appellate Division's application of the State's neutral rules governing joinder of parties would not violate the Supremacy Clause.

4. There has been no violation of the Constitutional rights of Native Americans.

Petitioner also argues that the dismissal of this action for failure to join an indispensable party deprives Native Americans of their Constitutional right to due process and equal protection of the laws. [Petition, p. 15].[7] His attempt to shoe-horn this case into the Griffin and Boddie line of cases fails, however. First, this case is readily distinguishable from Griffin and Boddie in that Petitioner has been "deprived" only of the opportunity to turn his status as a willing party to an unenforceable contract into a gold mine. He does not face either

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[7] See, note 6, supra.

incarceration (Griffin) or a lifetime trapped in a failed marriage (Boddie). Second, as discussed at Point II.b.1., supra, 25 U.S.C. 233 grants Native Americans precisely the same access to the New York courts as that accorded all other parties. Third, it is well-established that a dismissal of an action for failure to join an Indian nation as a party due to sovereign immunity "may leave a party with no forum for the party's claims." Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, 547 (2 Cir. 1991). The "due process" and "equal protection" issues raised by Petitioner are entirely illusory and provide no grounds for granting the Petition.

5. The Order of the Appellate Division does not conflict with federal case law.

The Seventh Circuit's holding in Thomas v. United States, 189 F.3d 662 (7 Cir. 1999), that a tribal governing body was not an indispensable party in an action by tribal members contesting the legality of the actions of federal officials in overturning the results of a tribal election depended upon the applicability in that case of the Indian Reorganization Act, 25 U.S.C. 461 et seq. ("IRA"), which explicitly qualified tribal sovereignty over its own affairs by granting exclusive authority over the administration and approval of elections to amend the tribal constitution to the Secretary of the Interior. It was solely because "the IRA explicitly reserves to the federal government the power to hold and approve the elections" and the issues raised in the case were therefore governed exclusively by federal and not by tribal law that the Seventh Circuit found that the nation's governing body was not an indispensable party.

There has been no federal action equivalent to the IRA to qualify the Tuscarora Nation's sovereign power to

regulate the provision of electric service on its territory. The only federal statute cited by the Appellant is 25 U.S.C. 233, which neither abrogates the Tuscarora Nation's treaty rights to self-government nor grants jurisdiction over such matters to the New York courts. See, discussion of 25 U.S.C. 233 at Point II.b.1., supra. There is therefore no conflict between this case and Thomas.

In Davis v. United States, 192 F.3d 951 (10 Cir. 1999), the Tenth Circuit reversed the District Court's dismissal of the complaint for failure to join an Indian nation as a party and remanded for consideration of the factors set forth in FRCP 19(b) because in dismissing the complaint, the District Court had apparently given no consideration to the particular facts of the case or interests at stake but had instead relied solely on the general principle that "there is very little room for balancing of other factors set out in Rule 19(b) because immunity may be viewed as one of those interests compelling in themselves". 192 F.3d at 960. In Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343 (2 Cir. 2000), the Second Circuit likewise vacated the District Court's dismissal of plaintiff's tort action against a museum (a privately-held corporation) located on the Pequot reservation for failure to join the Pequot Nation as a party on the grounds that the District Court had given no explanation of how the Pequot Nation's interests would be impaired by the continuation of the action in its absence, or even an explanation of what those interests were. 204 F.3d at 358-360

By contrast, the Appellate Division's references in its memorandum decision to its own recent decisions in Niagara Mohawk v. Anderson, 258 A.D.2d 958 (4 Dept. 1999) and Anderson v. Town of Lewiston, 244 A.D.2d 965 (4 Dept. 1997), decisions arising out of the same factual background, addressing the same issues and, for the

most part, involving the same parties, evidences the Appellate Division's thorough consideration and comprehension of the indispensable party factors set forth in CPLR 1001(b) as they pertain to this case. See, Points I, II.a., and II.b.2., supra.

CONCLUSION

For the foregoing reasons, the Tuscarora Nation supports the Respondent in opposing the Petition for a Writ of Certiorari in this case.

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Respectfully Submitted,

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